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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

GERTRUDE DONAHEY, TREASURER OF THE STATE OF OHIO, ET AL., Petitioners,

v.

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ET AL., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Gertrude Donahey, Treasurer of the State of Ohio; R. A. Horn, Ohio Director, Division of Federal Assistance; and Jack E. Brown, Ohio Coordinator, Title II, PL 89-10, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 16, 1970. The additional parties who joined with petitioners as defendants-appellees before the United States Court of Appeals for the Sixth Circuit were the United States of America and Robert B. French as Superintendent of The Dayton City School District, Dayton, Ohio.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 435 F. 2d 627 (1970). The opinion rendered by the District Court for the Southern District of Ohio, Western Division, is not reported. Both opinions appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 16, 1970. Petitioners submitted an application for extension of time in which to file their petition for a writ of certiorari to the Honorable Potter S. Stewart, Circuit Justice for the Sixth Circuit. On March 5, 1971, Justice Stewart ordered that the time for filing a petition for writ of certiorari be extended to and including April 26, 1971. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

1. Whether there is a meaningful constitutional distinction between the lending of secular library materials for use by the pupils and teachers at accredited, church-related schools under Title II of the Elementary and Secondary Education Act and the lending of secular textbooks for use by children in accredited, church-related schools as approved by this Court in *Board of Education v. Allen*, 392 U. S. 236 (1968).

2. Whether safeguards intended to insure that library materials will be secular constitute forbidden entanglement between the state and religion under the doctrine of *Walz v. Tax Commission*, 397 U. S. 664 (1970), when such safeguards are limited solely to the requirement that the library materials be selected from a list of materials approved for use in public schools.

3. Whether the possibility of indirect benefits to accredited, church-related schools creates a substantial federal constitutional claim which requires a three-judge court to be convened under 28 U. S. C. §2281 or §2282.

STATUTORY PROVISIONS INVOLVED

Protestants and Other Americans United for Separation of Church and State (POAU) and others brought this action to have Title II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 79 Stat. 36, 20 U. S. C. §§821-827, declared violative of the First and Fourteenth Amendments to the United States Constitution. The pertinent text of these statutory provisions follows:

"SUBCHAPTER I. — SCHOOL LIBRARY RESOURCES, TEXTBOOKS, AND OTHER INSTRUCTIONAL MATERIALS

"§821. Authorization of appropriations

"(a) The Commissioner shall carry out a program for making grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.

* * *

"§823. State plans

"(a) Any State which desires to receive grants under this subchapter shall submit to the Commissioner a State plan, in such detail as the Commissioner deems necessary, which—

* * *

"(2) sets forth a program under which funds paid to the State from its allotment under section 822 of this title will be expended solely for (A) acquisition of library resources (which for the purposes of this subchapter means books, periodicals, docu-

ments, audio-visual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State, and (B) administration of the State plan, including (i) the development and revision of standards relating to library resources, textbooks, and other printed and published instructional materials furnished for the use of children and teachers in the public elementary and secondary schools of the State, and (ii) the distribution and control by a local educational agency of such library resources, textbooks, and other instructional materials in carrying out such State plan for the use of children and teachers in schools referred to in clause (A), except that the amount used for administration of the State plan for any fiscal year shall not exceed an amount equal to 5 per centum of the amount paid to the State under this subchapter for that year or $50,000, whichever is greater;

"(3) sets forth the criteria to be used in allocating library resources, textbooks, and other printed and published instructional materials provided under this subchapter among the children and teachers of the State, which criteria shall—

"(A) take into consideration the relative need, as determined from time to time, of the children and teachers of the State for such library resources, textbooks, or other instructional materials,

"(B) provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State which comply with the compulsory attendance laws of the State or are other-

wise recognized by it through some procedure customarily used in the State, and

* * *

"§825. Public control of furnished materials; approval of public educational authorities

"(a) Title to library resources, textbooks, and other printed and published instructional materials furnished pursuant to this subchapter, and control and administration of their use, shall vest only in a public agency.

"(b) The library resources, textbooks, and other printed and published instructional materials made available pursuant to this subchapter for use of children and teachers in any school in any State shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are used, in a public elementary or secondary school of that State.

* * *

"§855. Prohibition against use of funds for religious worship or instruction

"Nothing contained in this Act shall be construed to authorize the making of any payment under this Act, or under any Act amended by this Act, for religious worship or instruction."

STATEMENT OF THE CASE

POAU and others filed their complaint in the United States District Court, Southern District of Ohio, Western Division, on June 10, 1966, for the purpose of testing the constitutionality of Title II of the Elementary and Secondary Education Act (ESEA) alleging a violation of the First and Fourteenth Amendments of the United States Constitution. This complaint was, of course, filed prior to the decision of this Court in *Board of Education v. Allen*, 392 U. S. 263 (1968).

Title II of ESEA provides library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools. [20 U. S. C. §§821, 823] POAU sought a judgment declaring Title II of ESEA to be unconstitutional, injunctive relief against the continued enforcement thereof, and damages in the amount of $5-million. POAU did not appeal from the dismissal of the damage claim by the District Court.

POAU further requested that a three-judge court be convened pursuant to 28 U. S. C. §§2281, 2284. Joined as defendants in the complaint were representatives of the State of Ohio, the City of Dayton School District, and the United States of America. POAU challenged the constitutionality of Title II of ESEA *on its face* and did not aver implementation of the legislation contrary to the specific statutory mandates.

Petitioners filed a motion to dismiss on August 16, 1966, raising, among other issues, the standing of plaintiffs to raise the issues in the complaint.

On March 20, 1967, the District Court rendered a written order dismissing the complaint on the grounds that plaintiffs lacked standing to raise the constitutional questions set forth in the complaint. That order is not pertinent to the matters now before this Court. The dismissal was appealed to the United States Court of Appeals for the Sixth Circuit and, in an unreported order, it held that plaintiffs had standing to sue on the authority of *Flast v. Cohen,* 392 U. S. 83 (1968). The case was then remanded to the District Court.

Thereafter, defendants filed motions for summary judgment.

In a memorandum opinion and order filed December 2, 1969, Judge Weinman declined to convene a three-judge court and granted summary judgment in favor of the defendants on the grounds that the issues of the case were controlled by the decision of the Supreme Court of the United States in *Board of Education v. Allen*, 392 U. S. 236 (1968).

The United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court and remanded the cause for further proceedings in conformity with the opinion. The Sixth Circuit found that Title II of ESEA "contains safeguards intended to insure the purchase of *secular* books and materials only. . . ." [435 F. 2d 629] However, the Court found a substantial distinction between loaning secular textbooks to children to be used in accredited, church-related schools and loaning library books for use of children and teachers in such schools. The basis for distinction was apparently that library books are retained on library shelves in the school except when checked out by the school children or teachers. The Court apparently ignored the fact that the textbooks in *Allen, supra,* were also stored in the schools.

The United States Court of Appeals for the Sixth Circuit further cited *Walz v. Tax Commission,* 397 U. S. 664 (1970), and concluded that safeguards which were designed merely to insure that public funds would be spent only for secular library materials presented a question of forbidden involvement of state with religion. The Court apparently misunderstood the *Walz* doctrines for it found that there was a substantial question of forbidden involvement even in the face of a minimal regulatory method for insuring the secularity of library materials. The Act simply limits the purchase of library

materials to those which have been approved by the appropriate state or local educational authority for use in the public schools of the state. [20 U. S. C. §825(b)]

Finally, the Sixth Circuit resurrected the indirect benefit argument and stated: "It can be argued also that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance." [435 F. 2d 629]

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with *Board of Education v. Allen*, 392 U. S. 236 (1968). The Sixth Circuit Would Require the District Court upon Remand to Find that There Is a Substantial Constitutional Difference between the Lending of Secular Library Materials for Use by Pupils and Teachers at Accredited, Church-Related Schools and the Lending of Secular Textbooks for Use by Children Attending Accredited, Church-Related Schools.

Congress in adopting the Elementary and Secondary Education Act of 1965 launched a wholesale nationwide attack upon educational deficiencies. These educational deficiencies were reflected in our youth in the form of rejected inductees for the armed forces, high unemployment rates, and a proven correlation between educational underachievement and poverty. This legislation has met with amazing success and has received nationwide acclaim. The adequacy of school libraries throughout the nation is at stake in this litigation. It would indeed be a travesty to require the District Court to start all over when there are no facts in dispute. It would be a pity to require the District Court to determine the constitutionality of this legislation on the basis of a

Court of Appeals' remand which is at marked variance from the legal propositions set forth so clearly by this Court in *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Walz v. Tax Commission*, 397 U. S. 664 (1970).

It would be difficult indeed for this legislation which has such vital significance to the young citizens in all fifty states to receive an appropriate constitutional airing before a Federal District Court which has been enjoined: (i) to find a substantial constitutional distinction *between secular library books on the shelf and secular textbooks in a school desk*, (ii) to search out indirect benefits or "freed funds" rather than the purpose and primary effect of the legislation, and (iii) to ponder over the question of whether the requirement that library books and materials be limited to those appearing on approved public school lists constitutes an excessive entanglement betweeen church and state. There is no need for a remand in this case. POAU alleges that this legislation is unconstitutional *on its face*. There very definitely is no need for a remand with instructions such as those set forth in the opinion below.

Even though Title II of ESEA is not the most heavily funded Title of the Act, it has a vital impact upon the education process in public and nonpublic educational institutions throughout the country. Counsel for the federal defendants in this litigation accurately and concisely analyzed the Congressional findings that led to the adoption of Title II of the Act:

> "Congress was advised that school library facilities were particularly inadequate in many areas. S. Rept. No. 146, 89th Cong., 1st Sess., 18-22 (1965), reprinted in 1965 U. S. Code Congressional & Administrative News, pp. 1463-66; H. Rept. No. 143, 89th Cong., 1st Sess., 8-11 (1965). The deficiency was especially marked in private schools. Whereas some 29.6 per

cent of all public school pupils in the nation attended schools without libraries, 37.2 per cent of all private school pupils attended such schools. S. Rept. No. 146, *supra*, at 20, 1965 U. S. Code Cong. & Admin. News at 1465. These figures contrasted with the growing need for adequate library facilities. The evidence before Congress indicated that the quality of school library programs 'is directly related to academic achievement, to remaining in high school, and to continuing in college.' S. Rept. No. 146, *supra*, at 19, 1965 U. S. Code Cong. & Admin. News at 1464. Congress was further informed that adequate library facilities would play an increasing educational role in the future, that 'the school composed chiefly of classrooms is obsolete and that in the schools of the future, upwards of half of the students' time may be spent in the library' or in similar facilities provided for individualized instruction and study. *Id.*

"Similar evidence was presented regarding the adequacy of textbooks and other instructional materials. Congress concluded, 'not only that there is a widespread lack of library resources, textbooks, and other instructional materials in our elementary and secondary schools, but also [that there will be] serious consequences to our educational programs in the event there is a failure to fill this need.' S. Rept. No. 146, *supra*, at 21, 1965 U .S. Code Cong. & Admin. News at 1466.

"Accordingly, Title II of the Act authorized the Commissioner of Education to make grants 'for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.' 20 U. S. C. §821(a). . . ."

[Brief for Federal Appellees, pp. 3-4]

One has to resort to "splitting hairs" in order to find any difference between the assistance provided under Title II of ESEA and that provided in *Allen, supra.*

In *Allen* secular textbooks were provided to pupils in accredited, church-related schools. Under Title II secular textbooks and library materials are provided to pupils attending accredited, church-related schools. The court below found, without hesitation, that only secular books and materials were being provided.

In *Allen* the public educational body insured that texts provided to pupils at church-related schools were secular by limiting them to textbooks in use in public schools. "[T]he books now loaned are 'textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, . . .'" [392 U. S. 239] In the Title II ESEA assistance the public educational body is assured that only secular library books will be provided to pupils at church-related schools by limiting such books and materials to those appearing on approved, public school lists. "The library resources, textbooks, and other printed and published instructional materials made available pursuant to this subchapter for use of children and teachers in any school in any State shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are used, in a public elementary or secondary school of that State." [20 U. S. C. §825]

In *Allen* the textbooks provided to pupils at church-related schools were owned by the state or a public body. "[A]nd ownership remains, at least technically, in the State. . . ." [392 U. S. 243] In Title II of ESEA title likewise remains with public agencies. "Title to library resources, textbooks, and other printed and published instructional materials furnished pursuant to this subchapter, and control and administration of their use, shall vest only in a public agency." [20 U. S. C. §825]

In *Allen* there was no replacement of church-related school effort for the textbooks were provided previously

at the cost of parents. [392 U. S. 244, Footnote 6] Likewise, Title II of ESEA [20 U. S. C. §823(a)(5)] requires that the federal assistance not supplant private school funds.

In *Allen* the textbooks were stored at the accredited, church-related schools. [392 U. S. 244, Footnote 6] In Title II ESEA library materials are quite naturally stored in school libraries.

The Sixth Circuit's attempt to distinguish *Allen* was stated as follows: "Title II of the Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools for use by the children and the teachers. . . ." This is a distinction without a difference and certainly a distinction without meaningful constitutional difference.

This Court in *Allen, supra,* after describing the "purpose and primary effect" test found:

> ". . . The statute upheld in Everson would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. . . ."
>
> [392 U. S. 243]

This Court further recognized in *Allen* the legitimate public purpose served by enhancement of the secular education of all children of the nation:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. *Americans care about the quality of the secular education available to their children.* They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. *This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.*

[392 U. S. 247-248, emphasis added]

The Sixth Circuit analyzed the question before it as follows:

"The claim would be deemed unsubstantial if, as the District Court held, the Supreme Court had passed upon the precise question involved in the present case.

"The only question, therefore, for us to decide is whether the District Court was correct in ruling that the constitutionality of the Act was resolved in *Allen.*"

[435 F. 2d 629]

We submit that the District Court was correct in ruling that the constitutionality of Title II of ESEA was resolved in *Allen.* We submit that the District Court was correct in concluding that the Supreme Court in the *Allen* case had passed upon the precise question involved in the present case.

Because POAU is asserting that the legislation is unconstitutional on its face, there is no need for a remand for the purpose of garnering additional facts. Either

there is a meaningful constitutional difference between a child taking a textbook out of his desk and carrying it home and a child taking a secular library book home from the school library after checking it out, or there isn't.

There is no need for a remand in this case. The facts are clear. The nature of assistance and implementation requirements are clearly set forth in 20 U. S. C. §§821 through 827. We submit that the principles announced in *Allen* are controlling in this case and that the District Court accurately dismissed the complaint on the basis of the *Allen* holding.

2. The "Excessive Entanglement" language in the *Walz* Case Was Not Intended to Proscribe Reasonable Regulatory Provisions Which Insure That Only Secular Library Materials Be Provided to Pupils and Teachers in Nonpublic Schools.

POAU has urged that this Court initiated "a whole new ball game" when it announced its opinion in *Walz v. Tax Commission,* 397 U. S. 664 (1970). It claims that the new ball game was announced by the following "excessive governmental entanglement" language:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—*is not an excessive governmental entanglement with religion.*"
>
> [397 U. S. 674, emphasis added]

POAU has seized upon this language and embarked upon a circuitous line of reasoning which would result

in the absurd conclusion that *Walz* intended to repudiate the principles earlier announced in *Board of Education v. Allen,* 392 U. S. 236 (1968), and in *Everson v. Board of Education,* 330 U. S. 1 (1947). In making such assertions POAU fails to appreciate the significance of the earlier portions of the *Walz* opinion which seems to rather clearly affirm the validity of the principles announced in those earlier cases:

> ". . . In so holding the Court was heeding both its own prior decisions and our religious tradition. Mr. Justice Douglas, in *Zorach v. Clauson,* supra, after recalling that we 'are a religious people whose institutions presuppose a Supreme Being,' went on to say:
>
> " 'We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . *When the state encourages religious instruction . . . it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.' 343 U. S., at 313-314, 96 L Ed at 961, 962. (Emphasis added.)
>
> *"With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed."*
>
> [397 U. S. 672, emphasis added]

The *Walz* decision seems to be a rather clear, commonsense, natural extension of the *Allen* doctrines. In *Allen* this Court looked to the purpose and primary effect of legislation and announced that legislation could not withstand the strictures of the Establishment Clause if either the purpose or primary effect advanced or in-

hibited religion. It appears to us that the "excessive entanglement" language simply means that the primary effect of advancement or inhibition of religion can be accomplished *either by the nature of the assistance provided or by the manner in which it is administered.* It seems to us that this language also re-emphasizes that such a statute can fail to withstand the strictures of the Establishment Clause if the administration of the Act results *in inhibition of religion* just as if it results in advancement of religion.

POAU would apparently place a substantially different interpretation upon the "excessive entanglement" language in *Walz.* POAU's bootstrapping argument goes something like this. It says that legislation is unconstitutional if it has as its primary effect an excessive government entanglement with religion. It argues that in order for legislation providing educational assistance to pupils in nonpublic schools to be constitutional, it must have a secular purpose and primary effect. It then argues that in order to insure a secular effect the state educational bodies must police the legislation. It finally argues that this policing necessarily results in excessive government entanglement with religion and that, therefore, the legislation is unconstitutional.

This, of course, just doesn't make sense. It seems almost absurd to suggest that this Court in the *Walz* case, after approving the course charted in the *Everson* and *Allen* cases, would promulgate a new doctrine which would destroy the viability of the *Everson* and *Allen* doctrines. It just doesn't make sense to suggest that this Court in *Walz,* after embracing the conclusions reached in *Everson* and *Allen,* would promulgate a new test which effectively proscribes any future public financial assistance to the secular education of pupils in accredited, church-related schools.

In any event, let's look at the rather clear implementation restrictions in Title II of ESEA. The administrative relationship between public education bodies and the church-related schools brought about by that legislation is minimal indeed. How does the state educational body insure that the library resources, textbooks, and other printed and published materials that are furnished to pupils and teachers in nonpublic schools are secular in nature? It doesn't have to censor books. It doesn't have to hide behind library shelves. It doesn't have to study religious doctrines. It doesn't have to conduct extensive interrogation of officials in church-related schools. It doesn't have to establish excessive contacts between church and public officials. It simply requires that no such materials be furnished unless they are identical to materials previously approved by a public body for use in a public elementary or secondary school of the state. [20 U. S. C. §825] Again, it is almost absurd to suggest that this can amount to excessive entanglement between church and state.

There is no need to remand this case to the District Court for a determination as to whether this kind of a regulation does or does not result in fatal excessive entanglement or whether or not this causes the legislation to have a primary effect of aiding or inhibiting religion. The method of implementation is clear. The constitutionality of the statute has been attacked facially.

3. This Case Should Not Be Remanded to the District Court for Inquiry into Possible Indirect Benefits to Accredited, Church-Related Schools.

The plaintiffs in *Board of Education v. Allen,* 392 U. S. 236 (1968), as well as the plaintiffs in *Everson v. Board of Education,* 330 U. S. 1 (1947), urged this Court that

the legislation under attack in those cases would result in the freeing of funds for church purposes. This Court refused to test the constitutionality of the legislation on the basis of potential indirect benefits. It is apparent that if funds were, in fact, freed by legislation providing secular educational assistance to pupils at accredited, church-related schools, the funds would be freed to parents who finance this education rather than to church organizations. However, there are no freed funds in this case. Neither were there freed funds in *Everson* or *Allen*. There are several rather clear reasons why there are no freed funds in this case, but the court below seemingly ignored them.

First of all, 20 U. S. C. §825 requires that title to all materials provided under Title II of ESEA be held by a public body rather than a church-related school. The church-related school cannot sell them or pledge them for financial gain. Rather, it incurs the costs of storing, cataloging, and reserving them, all to the secular educational benefit of this nation's young citizens. Secular educational materials are owned by a public body in this case just as they were in *Allen*.

There is an even more compelling reason why the Sixth Circuit was in error when it stated: "[I]t can be argued, also, that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance." [435 F. 2d 629] The Act expressly prohibits the freeing of funds previously spent by the accredited, church-related school. In order for any state plan to be assured, it must provide:

"§823. State plans

"(a) Any State which desires to receive grants under this subchapter shall submit to the Commissioner a

State plan, in such detail as the Commissioner deems necessary, which—

* * *

"(5) Sets forth policies and procedures designed to assure that Federal funds made available under this subchapter for any fiscal year will be so used as to supplement and, to the extent practical, increase the level of State, local, and private school funds that would in the absence of such Federal funds be made available for library resources, textbooks, and other printed and published instructional materials, *and in no case supplant such State, local, and private school funds*; . . ."

[Emphasis added]

In other words, the Act itself has maintenance of effort requirements and proscribes the freeing of funds. The Sixth Circuit simply ignored this very crucial provision of the Act.

Even if there were no statutory proscription against freeing of funds to church-related schools in this case, such indirect benefits would not be constitutionally fatal. If one were to follow this argument to its logical extreme, it would result in a conclusion that no citizen could receive public assistance if at the time of enactment of legislation directed to all citizens, he was receiving similar assistance from a voluntary church-related organization. For example, let us assume a given church-related organization was providing limited welfare assistance to five percent of the community and that the state legislative body thereafter decided that it would establish a new uniform welfare program for all needy citizens. Would the payment of welfare benefits under that act to citizens who were previously assisted by the church-related organization be unconstitutional because it freed funds that the church-related or-

ganization was voluntarily devoting to the public purpose? The extension of this argument to its logical extreme demonstrates its constitutional irrelevance.

The cutting off of indirect benefits was characterized as hostility in *Everson v. Board of Education,* 330 U. S. 1, 18:

> ". . . Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment."

Indirect benefits were not sufficient to demonstrate an unconstitutional degree of support for a religious institution in *Board of Education v. Allen,* 392 U. S. 236, 244:

> ". . . Perhaps free books make it more likely that some children choose to attend the sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."

This Court summarized prior rejection of indirect benefit claims in *Walz v. Tax Commission,* 397 U. S. 644, 671-672, as follows:

> ". . . Surely, bus transportation and police protection to pupils who receive religious instruction 'aid' that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools. But if as in *Everson* buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and li-

braries receiving the same tax exemption, is different for purposes of the Religion Clauses.

"Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. . . ."

[Emphasis added]

CONCLUSION

It is respectfully suggested that this writ should be granted. Plaintiffs have presented a facial attack upon legislation which on its face clearly demonstrates the secular nature of assistance and a method of implementation without excessive entanglement. The District Court quite properly concluded that the Supreme Court of the United States had passed upon the precise questions presented herein in the *Allen* case. The District Court was correct in ruling that the constitutionality of Title II of ESEA was resolved in the *Allen* case. There is no reason to remand this case to the District Court. No additional facts are necessary for a determination.

A remand of this case to the District Court would place that court in an impossible position. It is told by the Sixth Circuit that there is a meaningful constitutional difference between the assistance provided in this case and that in *Allen*. Yet, search as it will, the District Court will be unable to find any such meaningful difference.

The District Court is told by the Sixth Circuit that this litigation presents a substantial question of whether the safeguards intended to insure the purchase solely of

secular books and materials constitutes forbidden involvement of the state with religion. Yet, the District Court can determine quite readily from the face of the Act that the safeguards are simply the limitation of materials to those which have been approved for use or are being used in public schools.

Finally, the District Court is directed to embark upon a search for freed funds for religious purposes and indirect benefits. Why should the District Court be directed to embark upon such a search when the Act itself proscribes any reduction of local effort and requires the maintenance of such effort?

The District Court was not required to convene a three-judge court under the provisions of 28 U. S. C. §2281 inasmuch as the complaint does not present a substantial claim that Title II of ESEA violates the First or Fourteenth Amendments of the United States Constitutions. [*Bailey v. Patterson*, 369 U. S. 31 (1962)]

This legislation stands as a bulwark against educational deficiencies in our nation. It would indeed be lamentable if the District Court were forced to decide the constitutionality of this legislation pursuant to the strictures outlined by the Sixth Circuit.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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